

ENERGY AND ENVIRONMENT CABINET

Department for Environmental Protection

Division of Water

**(Amended After Comments)**

401 KAR 5:055. Scope and applicability of the KPDES Program.

RELATES TO: KRS 224.01-010, 224.01-070, 224.01-400, 224.70-100, 224.70-120, 224.99-010, 33 C.F.R. [Part] 153, 40 C.F.R. 122 [-21(n)(2)], 123.44, 144, [Part] 300, 401.15, 33 U.S.C. 1251-1387, 42 U.S.C. 300f-300j, EO 2008-507, 2008-531 [~~et seq., 1342~~]

STATUTORY AUTHORITY: KRS 224.10-100, 224.10-110, 224.16-050, 224.18-100, 224.70-100, [~~33 C.F.R. Part 153,~~] 40 C.F.R. 122.21[~~(n)(2)~~], [Part] 300, 33 U.S.C. 1251-1387 [~~et seq., 1342~~]

NECESSITY, FUNCTION, AND CONFORMITY: KRS 224.10-100 authorizes [~~provides that~~] the [~~Environmental and Public Protection~~] cabinet to [~~may~~] require for persons discharging into the waters of the Commonwealth, by administrative regulation, technological levels of treatment and effluent limitations. KRS 224.16-050(1) authorizes [~~provides that~~] the cabinet to [~~may~~] issue federal permits pursuant to 33 U.S.C. [~~USC Section~~] 1342(b) of the Federal Water Pollution Control Act, 33 U.S.C. [~~USC Section~~] 1251-1387 [~~et seq.~~] subject to the conditions imposed in 33 U.S.C. [~~USC Sections~~] 1342(b) and (d). KRS 224.16-050(1) requires that any exemptions granted in the issuance of these permits shall be pursuant to 33 U.S.C. [~~USC Sections~~] 1311, 1312, and 1326(a). [~~Further,~~] KRS 224.16-050(4) requires that the cabinet shall not impose under any permit issued pursuant to this administrative regulation an effluent limitation,

1 monitoring requirement, or other condition that ~~[which]~~ is more stringent than the effluent  
2 limitation, monitoring requirement, or other condition that ~~[which]~~ would have been applicable  
3 under the federal regulation if the permit was ~~[were]~~ issued by the federal government. EO 2008-  
4 507 and 2008-531, effective June 16, 2008, abolish the Environmental and Public Protection  
5 Cabinet and establish the new Energy and Environment Cabinet. This administrative regulation  
6 establishes ~~[contains]~~ the scope and applicability of the KPDES program and identifies categories  
7 of point sources required to obtain a KPDES permit, [§] requirements pertaining to exclusions and  
8 ~~[including specific inclusions and exclusions,]~~ prohibitions, [§] ~~[§]~~ requirements for general  
9 permits, [§] ~~[§]~~ requirements for disposal into wells and into publicly-owned treatment works  
10 (POTW), [§] and requirements for disposal by land application.

11 Section 1. Definitions. Definitions established in 40 C.F.R. 122.2 shall apply for the  
12 interpretation of federal regulations that are cited within this administrative regulation.

13 Section 2. Applicability of the KPDES Requirements.

14 **(1) A KPDES permit shall be required** ~~[The KPDES program shall require a permit]~~ to  
15 discharge pollutants from a point source into waters of the Commonwealth.

16 **(2) Compliance with the KPDES program requirements shall constitute compliance with the**  
17 operational permit requirements of 401 KAR 5:005.

18 **(3) Failure to obtain a KPDES permit shall not relieve a discharger whose discharge is subject**  
19 to the KPDES program from complying with the applicable performance standards of the KPDES  
20 program, 401 KAR 5:050 through 5:080.

21 Section 3. Point Source Categories Requiring a KPDES Permit.

22 **(1) The following categories of point sources shall require a KPDES permit to discharge:**

23 **(a) A point source discharge identified in 40 C.F.R. 122, effective July 1, 2008;**

1 (b) A concentrated animal feeding operation;

2 (c) A concentrated aquatic animal production facility;

3 (d) A discharge into aquaculture projects;

4 (e) A **discharge** ~~[discharges]~~ from separate storm sewers; and

5 (f) A silviculture point source.

6 (2) A facility covered by a general permit issued pursuant to Section 8 of this administrative  
7 regulation, may be required to obtain an individual permit based on contributions to water  
8 pollution.

9 (3) If an individual permit is required pursuant to this section, except as provided in subsection  
10 (4) of this section, the cabinet shall notify the discharger of that decision and the reasons for it.

11 (a) The discharger shall apply for a permit pursuant to 401 KAR 5:060 within sixty (60) days  
12 of notice, unless an extension is requested by the applicant.

13 (b) The question whether the **permit determination** ~~[designation]~~ was proper shall remain  
14 open for consideration during the public comment period pursuant to 401 KAR 5:075 and in a  
15 subsequent hearing pursuant to KRS 224.10-420(2).

16 (4)(a) Prior to a determination that an individual permit shall be required for a storm water  
17 discharge, the cabinet may require the discharger to submit ~~[a permit application or]~~ information  
18 regarding the nature of the discharge as established in 40 C.F.R. 122.21(e), **effective July 1, 2008,**  
19 if:

20 1. The provisions of the general permit are not sufficient to protect human health and the  
21 environment; or

22 2. The discharger has a history of non-compliance with the provisions of the general permit.

23 (b) If an individual permit is required pursuant to this section, the cabinet shall notify the

discharger of that decision and the reasons for it.

(c) The discharger shall apply for a KPDES permit within sixty (60) days of notice, unless an extension is requested by the applicant.

(d) The question whether the initial determination was proper shall remain open for consideration during the public comment period pursuant to 401 KAR 5:075 and in a subsequent hearing pursuant to KRS 224.10-420(2).

Section 4. Exclusions. An exclusion from the requirement to obtain a KPDES permit shall be:

(1) A discharge identified in 40 C.F.R. 122.3, **effective July 1, 2008**, or KRS 224.16-050(6);

(2) An authorization by permit or by rule that is prepared to assure that underground injection will not endanger drinking water supplies, pursuant to the Safe Drinking Water Act, 42 U.S.C. 300f-300j, and that are issued under a state or federal Underground Injection Control program;

**[and]**

(3) An underground injection control well that is permitted pursuant to 40 C.F.R. 144 if those permits are protective of public health and welfare and prevent the pollution of ground and surface waters; or

**(4) Discharges that are not regulated by the U.S. EPA under the Clean Water Act Section 402, 33 U.S.C. 1342.**

Section 5. Prohibitions. The cabinet shall not issue a KPDES permit if:

(1) The ~~[conditions of the]~~ permit **would** violate the provisions of KRS 224;

(2) The regional administrator has objected to issuance of the permit in writing pursuant to the procedures specified in 40 C.F.R. 123.44, **effective July 1, 2008**;

(3) The conditions of the permit do not comply with the water quality standards established in 401 KAR 10:031, interstate agencies, **or [and all]** affected states; or

1 (4) If a prohibition is established in 40 C.F.R. 122.4, **effective July 1, 2008.**

2 Section 6. Variance Requests from Technology-based Effluent Limitations.

3 (1) A non-POTW may request a variance from otherwise applicable effluent limitations as  
4 established in 40 C.F.R. ~~[CFR]~~ 122.21 (m), **effective July 1, 2008.**

5 (2) A non-POTW may request an expedited variance as established in 40 C.F.R. ~~[CFR]~~  
6 122.21(o), effective July 1, 2008.

7 Section 7. Effect of a Permit. The effect of a KPDES permit shall be as established in 40  
8 C.F.R. 122.5, **effective July 1, 2008.**

9 Section 8. A General permit shall be issued as established in 40 C.F.R. 122.28, **effective July**  
10 **1, 2008.**

11 Section 9. Disposal of Pollutants into Underground Injection Control Wells, into Publicly  
12 Owned Treatment Works, or by Land Application.

13 (1) An adjustment of effluent limitations related to disposal of pollutants into wells, into  
14 publicly owned treatment works, or by land application shall be as established in 40 C.F.R. 122.50,  
15 **effective July 1, 2008.**

16 (2) The cabinet may issue permits to control the disposal of pollutants into wells if necessary to  
17 protect the public health and welfare and to prevent the pollution of ground and surface waters.

18 Section 10. Variances from Technology-Based Treatment Requirements Available to KPDES  
19 Applicants. Consistent with KRS 224.16-050, the variance provisions in this section and in 401  
20 KAR 5:080, Sections 3 and 4, establishes those variances from technology-based requirements  
21 available to KPDES applicants.

22 (1) Economic capability. The cabinet, with the concurrence of U.S. EPA, may modify BAT  
23 requirements for a point source if the owner or operator demonstrates that the variance satisfies the

1 requirements of 33 U.S.C. 1311(c).

2 (2) Environmental considerations. The cabinet, with the concurrence of U.S. EPA, may  
3 modify the BAT requirement for a point source that does not discharge toxic pollutants identified  
4 in 40 C.F.R. 401.15, effective July 1, 2008, conventional pollutants, or the thermal component of  
5 that discharge, if the owner or operator demonstrates that the modification is consistent with the  
6 conditions established in 33 U.S.C. 1311(g).

7 (3) Innovative technology. The cabinet shall establish a date for complying with the deadline  
8 for achieving BAT not later than two (2) years after the date for compliance with the effluent  
9 limitation would otherwise be applicable, if the innovative technology is as established in 33  
10 U.S.C. 1311(k).

11 (4) Thermal pollution. An alternative effluent limitation for the thermal component of a  
12 discharge shall be as established in 33 U.S.C. 1326(a).

13 Section 11. Substitutions, Exceptions, and Additions to Cited Federal Regulations.

14 (1) “Waters of the Commonwealth” shall be substituted for “Waters of the United States” in  
15 the federal regulations cited in Sections 1 through 10 of this administrative regulation.

16 (2) “Cabinet” shall be substituted for “Director” if the ~~[cabinet has delegated]~~ authority to  
17 **administer [implement]** the federal regulations cited in Sections 1 through 10 of this  
18 **administrative regulation has been delegated to the cabinet.**

19 (3) “KPDES” shall be substituted for “NPDES” if the ~~[cabinet has been delegated]~~ authority  
20 to **administer [implement]** federal regulations cited in Sections 1 through 10 of this  
21 **administrative regulation has been delegated to the cabinet.**

22 (4) “Standard metropolitan statistical areas as defined by the University of Louisville Urban  
23 Studies Center, consistent with the U.S. Office of Management and Budget” shall be substituted

1 for “Standard metropolitan statistical areas as defined by the Office of Management and Budget”  
2 in 40 C.F.R. 122.28 (a)(1)(vi).

3 (5) “Urbanized areas as designated by the University of Louisville Urban Studies Center  
4 consistent with the U.S. Bureau of the Census” shall be substituted for “Urbanized areas as  
5 designated by the Bureau of the Census according to criteria in 30 FR 15202, effective May 1,  
6 1974” in 40 C.F.R. 122.28 (a)(1)(vi).

7 ~~[Applicability of the KPDES Requirements. The KPDES program shall require a permit to~~  
8 ~~discharge pollutants from a point source into waters of the Commonwealth. Compliance with the~~  
9 ~~KPDES program requirements shall constitute compliance with the operational permit~~  
10 ~~requirements of 401 KAR 5:005 and requirements related to the operational permit. Failure to~~  
11 ~~obtain a KPDES permit shall not relieve a discharger subject to the KPDES program from~~  
12 ~~complying with the applicable performance standards of that program, 401 KAR 5:050 to 5:080,~~  
13 ~~inclusive.~~

14 ~~(1) Specific inclusions. The following examples are specific categories of point sources that~~  
15 ~~require a KPDES permit to discharge. These terms are further defined in 401 KAR 5:002.~~

16 ~~—(a) Concentrated animal feeding operations;~~

17 ~~—(b) Concentrated aquatic animal production facilities;~~

18 ~~—(c) Discharges into aquaculture projects;~~

19 ~~—(d) Discharges from separate storm sewers;~~

20 ~~—(e) Silviculture point sources; and~~

21 ~~—(f) Permits required on a case by case basis.~~

22 ~~—1. Various sections of 401 KAR 5:060 allow the cabinet to determine, on a case-by-case~~  
23 ~~basis, that certain concentrated animal feeding operations, concentrated aquatic animal production~~

1 facilities, storm water discharges, and other facilities covered by a general permit, may be required  
2 to obtain an individual permit because of their contributions to water pollution.

3 ~~— 2. If the cabinet decides that an individual permit is required under this section, except as~~  
4 ~~provided in subparagraph 3 of this paragraph, the cabinet shall notify the discharger in writing of~~  
5 ~~that decision and the reasons for it, and shall send an application form with the notice. The~~  
6 ~~discharger shall apply for a permit under 401 KAR 5:060 within sixty (60) days of notice, unless~~  
7 ~~permission for a later date is granted by the cabinet. The question whether the designation was~~  
8 ~~proper shall remain open for consideration during the public comment period under 401 KAR~~  
9 ~~5:075 and in any subsequent hearing.~~

10 ~~— 3. Prior to a case-by-case determination that an individual permit is required for a storm water~~  
11 ~~discharge under 401 KAR 5:060, Section 12, the cabinet may require the discharger to submit a~~  
12 ~~permit application or other information regarding the discharge under 401 KAR 5:060, Section~~  
13 ~~1(6). In requiring the information, the cabinet shall notify the discharger in writing and shall send~~  
14 ~~an application form with the notice. The discharger shall apply for a permit under 401 KAR 5:060,~~  
15 ~~Section 12, within sixty (60) days of notice, unless permission for a later date is granted by the~~  
16 ~~cabinet. The question whether the initial designation was proper shall remain open for~~  
17 ~~consideration during the public comment period under 401 KAR 5:075 and in any subsequent~~  
18 ~~hearing pursuant to KRS 224.10-420(2).~~

19 ~~— (2) Specific exclusions. The following discharges shall not require KPDES permits:~~

20 ~~— (a) Discharge of sewage from vessels, effluent from properly functioning marine engines,~~  
21 ~~laundry, shower, and galley sink wastes, or other discharge incidental to the normal operation of a~~  
22 ~~vessel. This exclusion shall not apply to rubbish, trash, garbage, or other materials discharged~~  
23 ~~overboard; nor to other discharges if the vessel is operating in a capacity other than as a means of~~



~~transportation such as if used as an energy or mining facility, a storage facility or a seafood processing facility, or if secured to a storage facility or a seafood processing facility, or if secured in waters of the Commonwealth for the purpose of mineral or oil exploration or development.~~

~~—(b) Discharges of dredged or fill material into waters of the Commonwealth which are regulated under CWA Section 404 (33 USC Section 1344).~~

~~—(c) The introduction of sewage, industrial wastes, or other pollutants into publicly owned treatment works by indirect discharges. Plans or agreements to switch to this method of disposal in the future shall not relieve dischargers of the obligation to have and comply with permits until all discharges of pollutants to waters of the Commonwealth are eliminated.~~

~~—(d) Discharges in compliance with the instructions of an on-scene coordinator pursuant to 40 CFR Part 300 (The National Oil and Hazardous Substances Pollution Contingency Plan) or 33 CFR Part 153 (Pollution by Oil and Hazardous Substances), discharges in compliance with the state hazardous substance contingency plan issued pursuant to KRS 224.01-400, or discharges authorized by state on-scene coordinators in response to releases of hazardous substances, pollutants and contaminants or petroleum.~~

~~—(e) Introduction of pollutants from nonpoint source agricultural and silvicultural activities, including storm water run-off from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations, discharges from concentrated aquatic animal production facilities, discharges to aquaculture projects, and discharges from silvicultural point sources.~~

~~—(f) Return flows from irrigated agriculture.~~

~~—(g) Discharges into a privately owned treatment works, except as the cabinet may otherwise require under 401 KAR 5:065, Section 2(12).~~

1 ~~—(h) Authorizations by permit or by rule which are prepared to assure that underground injection~~  
2 ~~will not endanger drinking water supplies, pursuant to the Safe Drinking Water Act (42 USC~~  
3 ~~Section 300f et seq.), and which are issued under a state or federal Underground Injection Control~~  
4 ~~program; and, underground injections and disposal wells which are permitted by the cabinet~~  
5 ~~pursuant to 401 KAR Chapter 5.~~

6 ~~—(i) Discharges which are not regulated by the U.S. EPA under CWA Section 402, 33 USC~~  
7 ~~Section 1342.~~

8 ~~—Section 2. Prohibitions. No permit shall be issued by the cabinet:~~

9 ~~—(1) If the conditions of the permit do not provide for compliance with the applicable~~  
10 ~~requirements of KRS Chapter 224, or administrative regulations promulgated pursuant thereto;~~

11 ~~—(2) If the regional administrator has objected to issuance of the permit in writing under the~~  
12 ~~procedures specified in 40 CFR Section 123.44;~~

13 ~~—(3) If the imposition of conditions cannot ensure compliance with the applicable water quality~~  
14 ~~requirements of Kentucky and all affected states;~~

15 ~~—(4) If, in the judgment of the secretary of the U.S. Army, acting through the Chief of~~  
16 ~~Engineers, anchorage and navigation in or on waters of the United States would be substantially~~  
17 ~~impaired by the discharge;~~

18 ~~—(5) For the discharge of radiological, chemical, or biological warfare agent or high level~~  
19 ~~radioactive waste;~~

20 ~~—(6) For the discharge inconsistent with a water quality management plan or plan amendment~~  
21 ~~approved by EPA; or~~

22 ~~—(7) To a new source or a new discharger, if the discharge from its construction or operation~~  
23 ~~will cause or contribute to the violation of water quality standards. The owner or operator of a new~~

~~source or new discharger proposing to discharge into a water segment which does not meet Kentucky water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by the KPDES administrative regulations and for which the cabinet has performed a pollutant load allocation for the pollutants to be discharged, shall demonstrate, before the close of the public comment period, that:~~

~~—(a) There are sufficient remaining pollutant load allocations to allow for the discharge; and~~

~~—(b) The existing dischargers into that segment are subject to schedules of compliance designed to bring the segment into compliance with Kentucky water quality standards. The cabinet may waive the submission of information by the new source or new discharger required by this subsection if the cabinet determines that the cabinet already has adequate information to evaluate the request. An explanation of the development of limitations to meet the criteria of this paragraph shall be included in the fact sheet to the permit under 401 KAR 5:075, Section 4.~~

~~—Section 3. Variance Requests by Non-POTWs. A discharger which is not a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under the following statutory or regulatory provisions within the times specified in this section:~~

~~—(1) Fundamentally different factors. A request for a variance based on the presence of "fundamentally different factors" from those on which the effluent limitations guideline was based shall be filed as follows:~~

~~—(a) For a request from best practicable control technology currently available (BPT), by the close of the public comment period under 401 KAR 5:075.~~

~~—(b) For a request from best available technology economically achievable (BAT) or best conventional pollutant control technology (BCT), by no later than:~~

~~1. July 3, 1989, for a request based on an effluent limitation guideline promulgated before~~

~~February 4, 1987, to the extent July 3, 1989 is not later than that provided under previously promulgated administrative regulations; or~~

~~—2. 180 days after the date on which an effluent limitation guideline is published in the Federal Register for a request based on an effluent limitation guideline promulgated on or after February 4, 1987. The request shall explain how the requirements of 401 KAR 5:080, Section 3, have been met.~~

~~—(2) Nonconventional pollutants. A request for a variance from the BAT requirements for "nonconventional" pollutants, pursuant to Section 7(1) of this administrative regulation because of the economic capability of the owner or operator, or pursuant to Section 7(2) of this administrative regulation because of certain environmental considerations, shall be made as follows. A nonconventional pollutant variance shall be available only for ammonia; chlorine; color; iron; total phenols (4AAP), as determined by the U.S. EPA to be a pollutant covered by CWA, Section 301(b)(2)(F), 33 USC 1311(b)(2)(F); and any other pollutant which the U.S. EPA lists under CWA Section 301(g)(4), 33 USC 1311(g)(4).~~

~~—(a) For those requests for a variance from an effluent limitation based upon an effluent limitation guideline by:~~

~~—1. Submitting an initial request to the cabinet stating the name of the discharger, the permit number, the outfall number, the applicable effluent guideline, and whether the discharger is requesting a modification under Section 7(1) or (2) of this administrative regulation or both Section 7(1) and (2) of this administrative regulation. This request shall have been filed not later than:~~

~~—a. September 25, 1978, for a pollutant which is controlled by a BAT effluent limitation guideline promulgated before December 27, 1977; or~~

~~—b. 270 days after promulgation of an applicable effluent limitation guideline for guidelines~~

promulgated after December 17, 1977; and

~~2. Submitting a completed request no later than the close of the public comment period under 401 KAR 5:075, Section 5 demonstrating that the requirements of 401 KAR 5:075, Section 8 and the applicable requirements of 401 KAR 5:080 have been met. Notwithstanding this provision, the complete application for a request under Section 7(2) of this administrative regulation shall be filed 180 days before a decision is desired.~~

~~(b) For those requests for a variance from effluent limitation guidelines, the request need only comply with paragraph (a)2 of this subsection and need not be preceded by an initial request under paragraph (a)1 of this subsection.~~

~~(3) Delay in construction of POTW. An extension under CWA Section 301(i)(2), 33 USC 1311(i)(2) of the statutory deadlines in Section 301(b)(1)(A) or (b)(1)(C) of the CWA, 33 USC 1311(b)(1)(A) or (C) based on delay in completion of a POTW into which the source is to discharge shall have been requested on or before June 26, 1978 or 180 days after the relevant POTW requested an extension under 40 CFR 122.21(n)(2) whichever is later, but not later than January 30, 1988.~~

~~(4) Innovative technology. An extension under Section 7(3) of this administrative regulation from the deadline in 401 KAR 5:080, Section 1, for best available technology (BAT) or for best conventional pollutant control technology (BCT), based on the use of innovative technology, shall be requested no later than the close of the public comment period under 401 KAR 5:075, Section 5, for the discharger's initial permit requiring compliance with applicable effluent limitations. The request shall demonstrate that the requirements of 401 KAR 5:080 have been met.~~

~~(5) Thermal discharges. A variance under Section 7(4) of this administrative regulation for the thermal component of a discharge shall be filed with a timely application for a permit under 401~~

~~KAR 5:060, except that if thermal effluent limitations are established by EPA or are based on Kentucky water quality standards the request for a variance shall be filed by the close of the public comment period under 401 KAR 5:075, Section 5.~~

~~—Section 4. Expedited Variance Procedures and Time Extensions. Notwithstanding the time requirements in Section 3 of this administrative regulation, the cabinet may notify a permit applicant before a draft permit is issued under 401 KAR 5:075, Section 3, that the draft permit will likely contain limitations which are eligible for variances.~~

~~—(1) In the notice the cabinet may require the applicant as a condition of consideration of any potential variance request to submit a request explaining how the requirements of 401 KAR 5:080 applicable to the variance have been met. The cabinet may require the submittal within a specified reasonable time after receipt of the notice. The notice may be sent before the permit application has been submitted. The draft or final permit may contain the alternative limitations which shall become effective upon final grant of the variance.~~

~~—(2) A discharger who cannot file a complete request required under Section 3(2) of this administrative regulation may request an extension. The extension may be granted or denied by the cabinet. Extensions shall not be more than six (6) months in duration.~~

~~—Section 5. General Permits. (1) Coverage. The cabinet shall issue a general permit in accordance with the following:~~

~~—(a) Area. The general permit shall be written to cover one (1) or more categories or subcategories of discharges described in the permit under paragraph (b) of this subsection, except those covered by individual permits, within a geographic area. The area shall correspond to existing geographic or political boundaries, such as:~~

~~—1. Designated planning areas under CWA Sections 208 and 303, 33 USC Sections 1288 and~~

1313;

~~2. City, county, or state political boundaries;~~

~~3. State highway systems;~~

~~4. Standard metropolitan statistical areas as defined by the University of Louisville Urban Studies Center, consistent with the U.S. Office of Management and Budget;~~

~~5. Urbanized areas as designated by the University of Louisville Urban Studies Center consistent with the U.S. Bureau of the Census; or~~

~~6. Other appropriate division or combination of boundaries.~~

~~(b) Sources. The general permit shall be written to regulate, within the area described in paragraph (a) of this subsection, either:~~

~~1. Storm water point sources; or~~

~~2. One (1) or more categories or subcategories of point sources other than storm water point sources, or one (1) or more categories or subcategories of treatment works treating domestic sewage, if the sources or treatment works treating domestic sewage within each category or subcategory all:~~

~~a. Involve the same or substantially similar types of operations;~~

~~b. Discharge the same types of wastes;~~

~~c. Require the same effluent limitations or operating conditions;~~

~~d. Require the same or similar monitoring; and~~

~~e. In the opinion of the cabinet, are more appropriately controlled under a general permit than under individual permits.~~

~~(c) Water quality based limits. If sources within a specific category or subcategory of dischargers are subject to water quality based limits imposed pursuant to 401 KAR 5:065,~~

~~Section 2(4), the sources in that specific category or subcategory shall be subject to the same water quality based effluent limitations.~~

~~—(d) Other requirements.~~

~~—1. The general permit shall clearly identify the applicable conditions for each category or subcategory of dischargers or treatment works treating domestic sewage covered by the permit.~~

~~—2. The general permit may exclude specified sources or areas from coverage.~~

~~—(2) Administration.~~

~~—(a) General permits shall be issued, modified, revoked and reissued, or revoked in accordance with applicable requirements of 401 KAR 5:075.~~

~~—(b) Requiring an individual permit.~~

~~—1. The cabinet may require any person authorized to discharge by a general permit to apply for and obtain an individual KPDES permit. Interested person may petition the cabinet to take action under this paragraph. An individual KPDES permit may be required if:~~

~~—a. The discharger is not in compliance with the conditions of the general KPDES permit;~~

~~—b. A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source;~~

~~—c. Effluent limitation guidelines are promulgated for point sources covered by the general KPDES permit;~~

~~—d. A Kentucky Water Quality Management Plan containing requirements applicable to these point sources is approved; or~~

~~—e. The requirements of subsection (1) of this section are not met.~~

~~—2. An owner or operator authorized by a general permit may request to be excluded from the coverage of the general permit by applying for an individual permit. The owner or operator shall~~



1 submit an application under ~~401 KAR 5:060, Section 1, to the cabinet with reasons supporting~~  
2 the request. The request shall be submitted no later than ninety (90) days after the notice by the  
3 cabinet in accordance with ~~401 KAR 5:075, Section 5. The request shall be processed under 401~~  
4 ~~KAR 5:075. If the reasons cited by the owner or operator are adequate to support the request, the~~  
5 cabinet may issue an individual permit.

6 —~~3. If an individual KPDES permit is issued to an owner or operator otherwise subject to a~~  
7 general KPDES permit, the applicability of the general permit to the individual KPDES permittee  
8 is automatically revoked on the effective date of the individual permit.

9 —~~4. A permittee, excluded from a general permit solely because the permittee already has an~~  
10 individual permit, may request that the individual permit be revoked. The permittee shall then  
11 request to be covered by the general permit. Upon revocation of the individual permit, the general  
12 permit shall apply to the source.

13 —~~Section 6. Disposal of Pollutants into Wells, into POTWs or by Land Application. (1) The~~  
14 cabinet may issue permits to control the disposal of pollutants into wells, if necessary to protect the  
15 public health and welfare and to prevent the pollution of ground and surface waters.

16 —~~(2) If part of a discharger's process wastewater is not being discharged into waters of the~~  
17 Commonwealth because it is disposed into a well, into a POTW, or by land application thereby  
18 reducing the flow or level of pollutants being discharged into waters of the Commonwealth,  
19 applicable effluent standards and limitations for the discharge in a KPDES permit shall be  
20 adjusted to reflect the reduced raw waste resulting from this disposal. Effluent limitations and  
21 standards in the permit shall be calculated by one (1) of the following methods:

22 —~~(a) If none of the waste from a particular process is discharged into waters of the~~  
23 Commonwealth, and effluent limitations guidelines provide separate allocation for wastes from

1 ~~that process, all allocations for the process shall be eliminated from calculation of permit effluent~~  
2 ~~limitations or standards.~~

3 ~~—(b) In all cases other than those described in paragraph (a) of this subsection, effluent~~  
4 ~~limitations shall be adjusted by multiplying the effluent limitation derived by applying effluent~~  
5 ~~limitation guidelines to the total waste stream by the amount of wastewater now to be treated and~~  
6 ~~discharged into waters of the Commonwealth, and dividing the result by the total wastewater flow.~~  
7 ~~Effluent limitations and standards so calculated may be further adjusted under 401 KAR 5:080,~~  
8 ~~Section 3, to make them more stringent if discharges to wells, publicly owned treatment works, or~~  
9 ~~by land application change the character or treatability of the pollutants being discharged to~~  
10 ~~receiving waters. This method shall be algebraically expressed as:~~

$$11 \quad P = E \times N / T$$

12 ~~—When P is the permit effluent limitation, E is the limitation derived by applying effluent~~  
13 ~~guidelines to the total waste stream, N is the wastewater flow to be treated and discharged to~~  
14 ~~waters of the Commonwealth and T is the total wastewater flow.~~

15 ~~—(3) Subsection (2) of this section shall not apply to the extent that promulgated effluent~~  
16 ~~limitations guidelines:~~

17 ~~—(a) Control concentrations of pollutants discharged but not mass; or~~

18 ~~—(b) Specify a different specific technique for adjusting effluent limitations to account for well~~  
19 ~~injection, land application, or disposal into POTWs.~~

20 ~~—(4) Subsection (2) of this section does not alter a discharger's obligation to meet more stringent~~  
21 ~~requirements established under 401 KAR 5:065.~~

22 ~~—Section 7. Variances Available to KPDES Applicants. Consistent with KRS 224.16-050, the~~  
23 ~~variance provisions in this section and in 401 KAR 5:080, Sections 3 and 4, lists, inclusively, those~~

1 ~~variances available to KPDES applicants.~~

2 ~~—(1) Economic capability. The cabinet, with the concurrence of EPA, may modify the BAT~~  
3 ~~requirements set out in 401 KAR 5:080, Section 1, for a point source, upon a showing by the~~  
4 ~~owner or operator of that point source, satisfactory to the cabinet that the modified requirement~~  
5 ~~will:~~

6 ~~—(a) Represent the maximum use of technology within the economic capability of the owner or~~  
7 ~~operator; and~~

8 ~~—(b) Result in reasonable further progress toward the elimination of the discharge of pollutants.~~

9 ~~—(2) Environmental considerations.~~

10 ~~—(a) The cabinet, with the concurrence of EPA, may modify the BAT requirement set out in 401~~  
11 ~~KAR 5:080, Section 1, for a point source which does not discharge toxic pollutants identified in~~  
12 ~~401 KAR 5:080, Section 6, conventional pollutants, or the thermal component of that discharge~~  
13 ~~upon a showing by the owner or operator satisfactory to the cabinet that:~~

14 ~~—1. The modified requirement shall result, at a minimum, in compliance with the BPT~~  
15 ~~requirement identified in 401 KAR 5:080 or Kentucky water quality standards, whichever is~~  
16 ~~applicable;~~

17 ~~—2. The modified requirement shall not result in any additional requirement on any other point~~  
18 ~~or nonpoint source; and~~

19 ~~—3. The modification shall not:~~

20 ~~—a. Interfere with the attainment or maintenance of that water quality which will assure~~  
21 ~~protection of public water supplies, protection and propagation of a balanced population of~~  
22 ~~shellfish, fish, and wildlife, and allow recreational activities in and on the water; and~~

23 ~~—b. Result in the discharge of pollutants in quantities which may reasonably be anticipated to~~

~~pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity, including carcinogenicity, mutagenicity or teratogenicity, or synergistic propensities.~~

~~—(b) If an owner or operator of a point source applies for a modification under this section for a pollutant, that owner or operator shall be eligible to apply for a modification under subsection (1) of this section with respect to that pollutant only during the same time period as he is eligible to apply for a modification under this section.~~

~~—(3) Innovative technology.~~

~~—(a) The cabinet shall establish a date for complying with the deadline for achieving BAT set out in 401 KAR 5:080, Section 1, no later than two (2) years after the date for compliance with the effluent limitation which would otherwise be applicable, if the owner or operator establishes to the satisfaction of the cabinet the following:~~

~~—1. That the existing production capacity of the facility will be replaced with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to that facility, and which moves toward the state's goal of eliminating the discharge of all pollutants; or~~

~~—2. That an innovative control technique will be installed which has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation, and which moves toward the state's goal of eliminating the discharge of all pollutants; or~~

~~—3. That an innovative system will be installed which has the potential for significantly lower costs than the system which has been determined by the cabinet to be economically achievable.~~

~~—(b) The innovative system shall have the potential for industry wide application.~~

~~—(c) The cabinet shall not modify any requirement under this section which applies to a pollutant on the toxic pollutant list set out at 401 KAR 5:080, Section 6.~~

~~—(d) The cabinet may include any of the following conditions in the permit of a discharger to which a compliance extension beyond the otherwise applicable compliance date is granted:~~

~~1. A requirement that the discharger report annually on the installation, operation, and maintenance costs of the innovative technology; or~~

~~2. Alternative BAT limitations that the discharger shall meet as soon as possible and not later than two (2) years after the date for compliance with the effluent limitation which would otherwise be applicable if the innovative technology limitations that are more stringent than BAT are not achievable.~~

~~—(4) Thermal pollution.~~

~~—(a) The cabinet may impose an alternative effluent limitation for the thermal component of a discharge from a point source if the owner or operator can establish to the satisfaction of the cabinet that the original effluent limitation proposed by the cabinet is more stringent than necessary to assure the protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge will be made.~~

~~—(b) The alternative effluent limitation imposed by the cabinet upon request by the owner or operator shall take into account the interaction of the thermal component with other pollutants, and shall assure the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife in and on that body of water.~~

~~—Section 8. Federal Regulations Adopted Without Change. The following federal regulations govern the subject matter of this administrative regulation and are hereby adopted without change. The federal regulations are available for inspection and copying, during normal business hours of 8~~

1 a.m. to 4:30 p.m., eastern time, excluding state holidays, at the Division of Water, 14 Reilly Road,  
2 Frankfort, Kentucky, or may be purchased from the U.S. Superintendent of Documents,  
3 Washington, D.C.

4 —(1) 33 CFR Part 153, "Pollution by Oil and Hazardous Substances," as in effect on July 1,  
5 2001 for the description of emergency discharges exempt from KPDES permit requirements;

6 —(2) 40 CFR 122.21(n)(2), "Permit compliance extensions allowed for delays in construction  
7 of POTW," as in effect on July 1, 2001 for permit extensions as referenced in Section 3(3) of this  
8 administrative regulation; and

9 —(3) 40 CFR Part 300, "The National Oil and Hazardous Substances Pollution Contingency  
10 Plan," as in effect on July 1, 2001 for the description of emergency dischargers exempt from  
11 KPDES permit requirements. ]

401 KAR 5:055 “Scope and applicability of the KPDES Program.” (Amended After Comments)

approved for promulgation:

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Date

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Henry “Hank” List, Deputy Secretary, FOR  
Leonard K. Peters, Secretary  
Energy and Environment Cabinet

## REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Administrative Regulation #: 401 KAR 5:055

Contact Person: Peter T. Goodmann, Assistant Director

### **(1) Provide a brief summary of:**

#### **(a) What this administrative regulation does:**

This administrative regulation sets forth the scope and applicability of the KPDES program including specific inclusions and exclusions, prohibitions, requirements for general permits, requirements for disposal into wells and into publicly-owned treatment works (POTW) and disposal by land application.

#### **(b) The necessity of this administrative regulation:**

KRS 224.16-050 (1) requires that any exemptions granted in the issuance of these permits shall be pursuant to 33 U.S.C. 1311, 1312, and 1326(a). Further, KRS 224.15-050(4) requires that the cabinet shall not impose under any permit issued pursuant to this administrative regulation an effluent limitation, monitoring requirement or other condition that is more stringent than the effluent limitation, monitoring requirement or other condition that would have been applicable under the federal regulation if the permit were issued by the federal government.

#### **(c) How this administrative regulation conforms to the content of the authorizing statutes:**

KRS 224.10-100 authorizes the cabinet to require for persons discharging into the waters of the Commonwealth, by administrative regulation, technological levels of treatment and effluent limitations. KRS 224.16-050(1) provides that the cabinet may issue federal permits pursuant to 33 U.S.C. 1342(b) of the Federal Water Pollution Control Act, 33 U.S.C. 1251-1387.

#### **(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes:**

This regulation provides specific bounds for the scope of the KPDES program.

### **(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:**

#### **(a) How the amendment will change this existing administrative regulation:**

This amendment will clarify that the cabinet must develop permit limitations to satisfy standards developed by interstate agencies. This amendment also revises ambiguous terms in accordance with KRS 13A and provides federal citations and strikes the federal language reproduced in the body of the state administrative regulation. Amendments were made after comments to insert effective dates for each of the citations to federal regulations and to explicitly exclude discharges that are not regulated under the Clean Water Act from the applicability of this regulation.

#### **(b) The necessity of the amendment to this administrative regulation:**

It is necessary to amend this administrative regulation to clarify a debate of the legal requirement of including limitations developed by an interstate agency. This amendment makes it clear that such limitations are required.

#### **(c) How the amendment conforms to the content of the authorizing statutes:**

This amendment conforms to KRS 224.16-050, which authorizes the cabinet to implement the Federal Water Pollution Control Act. This amendment also conforms to KRS 224.18-100, which authorizes interstate environmental compacts.

#### **(d) How the amendment will assist in the effective administration of the statutes:**

The amendment clarifies that the cabinet has authority to impose permit requirement developed pursuant to an interstate agency standard. The amendment will aid in carrying out the goals of



KRS Chapter 224. The cabinet also believes that citing federal regulations will allow future federal changes in regulatory requirements to be more easily adopted.

**(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation:**

This amendment affects individuals, businesses, and organizations that are engaged in the regulated disposal of treated wastewater under the KPDES permitting program. This regulation affects over 10,000 existing permitted entities including individuals, businesses and governmental organizations. After analysis of the current types of permits, the regulation is expected to impact the following number of entities:

- a. Individuals: 100 per year for new permit issuances under the individual family residence permit. Renewal of these permits would average 300 per year. However, renewals of general permits occur as a batch once every five years.
- b. Businesses: 1600 per year, primarily through industrial permits, non-public entity sanitary wastewater permits, and stormwater coverage issuances.
- c. Organizations: 100 per year, primarily through individual sanitary permits issued to non-public organizations such as churches, summer camps, and private social or sporting clubs.
- d. State or Local Government: 30 per year, primarily through permits for Public-Owned Treatment Works (POTWs).

**(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:**

**(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment:**

The regulated entities will have to comply with permit conditions and limitations that are pursuant to the standards of interstate agencies. This change should cause very little additional impact. The cabinet's requirements are typically as stringent as those of the existing interstate agency (ORSANCO).

**(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3):**

None of the entities identified in question (3) should have an increased cost due to this amendment.

**(c) As a result of compliance, what benefits will accrue to the entities identified in question (3):**

Regulated entities will not be confused by potential authority gaps arising between state and federal regulations as applied in interstate waters.

**(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:**

**(a) Initially:** No additional cost is anticipated.

**(b) On a continuing basis:** No additional cost is anticipated.

**(6) What is the source of the funding to be used for the implementation and enforcement of**

**this administrative regulation?**

Existing permit fees, General Funds, and EPA Funds. There is no change in source of funding because of this amendment.

**(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment:**

No additional fees or funding are expected to support this amendment.

**(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees:**

This amendment does not directly or indirectly affect fees.

**(9) TIERING: Is tiering applied? (Explain why or why not)**

This administrative regulation provides tiered requirements through the identification of classes of industrial users, specific requirements of POTWs, and requirements for specific categories of dischargers. Program requirements and limitations depend upon the size and the specific category of the user.

## FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

**Regulation #:** 401 KAR 5:055

**Contact Person:** Peter T. Goodman, Assistant Director

- 1. Does this administrative regulation relate to any program, service, or requirements of a state or local government (including cities, counties, fire departments, or school districts)?**

Yes   X   No       

If yes, complete questions 2-4.

- 2. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation?**

This regulation affects wastewater treatment systems that discharge to waters of the Commonwealth. This regulation affects all units of state or local government that have a KPDES discharge permit. The proposed amendment affects only those who discharge into waters bordering other states.

- 3. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation.**

The Clean Water Act and KRS 224

- 4. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.**

- (a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year?**

This amendment is not expected to generate additional state or local government revenue.

- (b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years?**

This amendment is not expected to generate additional state or local government revenue.

- (c) How much will it cost to administer this program for the first year?**

There will be no change in cost.

- (d) How much will it cost to administer this program for subsequent years?**

There will be no change in cost.

**Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.**

**Revenues (+/-):**

**Expenditures (+/-):**

**Other Explanation:**

## FEDERAL MANDATE ANALYSIS COMPARISON

Administrative Regulation#: 401 KAR 5:055

Contact Person: Peter T. Goodmann, Assistant Director

**1. Federal statute or regulation constituting the federal mandate.**

40 CFR 122 and U.S.C. 1251-1387.

**2. State compliance standards.**

KRS 224.16-050

**3. Minimum or uniform standards contained in the federal mandate.** The federal standard requires that primacy states meet or exceed the federal requirements for water pollution prevention developed under the Clean Water Act, as Amended (33 U.S.C. 1251-1387).

**4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements than those required by the federal mandate?**

No, the amendment to this regulation will not apply stricter standards than those required by the federal mandate. However, the existing language of the regulation applies to “Waters of the Commonwealth”, which has a slightly different definition than “Waters of the United States.” The Kentucky definition for “Waters of the Commonwealth”, established in KRS 224.01-010(33) includes ground water, but the definition for “Waters of the United States” does not include ground water.

**5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements.**

The amendment to this regulation will not apply stricter standards than those required by the federal mandate. However, the existing language of the regulation applies to “Waters of the Commonwealth”, which has a slightly different definition than “Waters of the United States.” The Kentucky definition for “Waters of the Commonwealth”, established in KRS 224.01-010(33) includes ground water, but the definition for “Waters of the United States” does not include ground water.

The cabinet has explicitly excluded discharge that are not regulated under the Clean Water Act from the scope of this regulation.